NO. 48560-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MANUEL V. ALVAREZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-03634-7

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On September 16, 2014, the Pierce County Prosecutor's Office charged MANUEL ALVAREZ (hereinafter "defendant") with four counts of Child Molestation in the First Degree pursuant to RCW 9A.44.083. CP

1-3[1]. On December 7, 2015, the case proceeded to trial before the Honorable Stanley Rumbaugh. 7RP[2] 5; CP 41. The jury found defendant guilty of two counts of child molestation in the first degree (Counts I and IV), and not guilty of two counts of child molestation in the first degree (Counts II and III). CP 126-129; 15RP 5. At sentencing, the court imposed an indeterminate sentence of 73 months to life confinement with lifetime community custody. CP 132-147; SRP 13. Defendant filed a timely notice of appeal. CP 157.

2. Facts

A.R. was born on May 20, 1998. 11RP 56. A.R.'s mother, Elizabeth Reyna (hereinafter "Reyna"), met defendant in 2001 when A.R. was three years old. 12RP 107. Reyna and her children, A.R., L.R. and Joanna (Reyna) Sears, were living in a shelter in Tacoma. 12RP 77-78, 106-07. Reyna and defendant started dating. 12RP 107. In 2002, Reyna moved with her children to the Montclaire apartments in Fife. 12RP 78, 106-08. They lived there for about two years. 12RP 108. Defendant

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[1] An amended information and second amended information were later filed which removed the domestic violence related designations and amended the incident dates. CP 54-55; CP 96-97.

[2] The verbatim report of proceedings is contained in multiple separately paginated volumes and will be referred to as follows: 1RP – 3/20/15; 2RP – 4/24/15; 3RP – 6/26/15; 4RP – 9/18/15; 5RP – 10/9/15; 6RP – 12/3/15; 7RP – 12/7/15; 8RP – 12/8/15; 9RP – 12/9/15; 10RP – 12/10/15; 11RP – 12/14/15; 12RP – 12/15/15; 13RP – 12/16/15; 14RP – 12/17/15; 15RP – 12/21/15; SRP – Sentencing held 2/2/16. For purposes of clarity, this is the same manner in which appellant refers to the verbatim report of proceedings in his opening brief.

rented an apartment nearby. 12RP 108. Reyna and her children then moved to the Sherwood apartments and lived there for about two years. 12RP 79, 109. Defendant lived next door at the Wapato apartments.[3] 11RP 67, 12RP 109-10. Defendant was "always around" and frequently spent the night at Reyna's apartment. 12RP 81. A.R. was approximately six or seven years old when they lived in the Sherwood apartments. 11RP 67, 12RP 80, 110-11.

During this time, A.R would often go over to defendant's apartment to watch television while her mother worked. 11RP 68. A.R. went over to defendant's apartment a few times a week and would stay for a couple of hours. 11RP 68. A.R. would go by herself, because her siblings would be sleeping and A.R. "had nothing else to do." 11RP 68-69. Defendant and Reyna were still dating during this time, but their relationship was "always on and off." 11RP 67, 12RP 110. Defendant would sometimes take A.R. out to eat and to get toys. 11RP 69. A.R. described her relationship with defendant as "[l]ike a stepdaughter," and she looked to defendant as a father figure. 11RP 69-70.

A.R. felt safe going over to defendant's apartment. 11RP 70. However, defendant did something that A.R did not like – he would put his hands down A.R.'s pants. 11RP 71. At defendant's apartment,

[3] The Sherwood and Wapato apartments were separated by a fence. 11RP 67, 12RP 80, 110.

defendant and A.R. would watch television together, and "then [defendant] would tell [A.R.] to lay next to him [on the sofa] and he would put his hands down [A.R.'s] pants." 11RP 72. Defendant would "just leave [his hand] there. He wouldn't do anything. He would just place it down there." 11RP 72. Defendant would slide his hand underneath A.R.'s clothes down to her buttocks and vagina.[4] *Id.* The touching would usually last a couple of minutes. *Id.* A.R. estimated that this touching occurred approximately eight or ten times at defendant's apartment. 11RP 73, 12RP 9. A.R. told defendant not to touch her because "it didn't feel right," but "[defendant] didn't stop. He kept doing it." 12RP 10-11.

A.R. did not tell anyone about defendant touching her, because she thought it was normal behavior. 11RP 73-74. A.R. testified, "I thought it was completely normal for a father to do that, since I never had a father figure in my life." 12RP 10. A.R. was six or seven years old at the time. 11RP 71.

In 2006, Reyna moved to the Mount View apartments and lived there for approximately two years. 12RP 112-13. Reyna lived there with A.R., friend Leticia Rodriguez ("Lettie"), and Reyna's daughter D.R., who was

[4] A.R. described her butt as "where the crack is." 12RP 9. Defendant touched her vagina area "on the surface... he would place his hand down there like where you grow hair." 12RP 10. A.R. described the area as "[o]n the torso" as opposed to "more between your legs." 12RP 10.

born in 2007. 12RP 25-26, 106, 111-12. D.R. is Reyna's child by defendant. 12RP 95, 120, 128. Defendant lived with them for a short period of time. 12RP 112-13. Reyna and her family thereafter moved to the Chateau Rainier apartments in Fife and lived there for two years (until A.R. was about 12 years old). 12RP 19, 114. Defendant also lived with them at the Chateau Rainier for a period of time. 12RP 114.

While they were living at the Chateau Rainier apartments, there was another incident where defendant touched A.R. inappropriately. 12RP 18-19. A.R. was 10 or 11 years old at the time. 12RP 19. Defendant and A.R. were laying down watching a movie, and A.R. fell asleep. 12RP 19. A.R. woke to defendant touching her in-between her legs, near her vagina.[5] 12RP 19-20. Defendant touched A.R. around her clitoris, and she described his fingers as moving up and down. 12RP 20, 22. A.R. cried and told defendant to stop. 12RP 21. Defendant carried A.R. to her mother's room and continued to touch her. 12RP 19, 23. A.R.'s mother had left for work. 12RP 19, 23. Defendant grabbed A.R.'s "butt" and tried to place his fingers into her "butt hole."[6] 12RP 23-24. Defendant did not say anything. 12RP 24. Defendant then stopped touching A.R. and fell asleep. 12RP 24. A.R. ran to the bathroom and locked herself inside.

[5] A.R. clarified that defendant used his hand. 12RP 21.
[6] This was done over A.R.'s clothing. 12RP 24.

12RP 21-22, 24. A.R. testified that defendant did not touch her like that again. 12RP 24.

A couple of months after the incident in the Chateau Rainer apartment, A.R. told "Aunt Lettie" about defendant touching her.[7] 12RP 25-26. A.R. felt close to Aunt Lettie, who took care of A.R. and A.R.'s younger sister. 12RP 26. Aunt Lettie and A.R subsequently told A.R.'s sister and mother. 12RP 27. A.R.'s older sister, Joanna Sears, testified that A.R. and Lettie came over to her home when A.R. was 10 or 11 years old. 12RP 76, 90-91. A.R. was crying, and Lettie appeared angry. 12RP 91-92. They had a conversation, and then Sears called her mother (Reyna) on the phone. 12RP 92. A.R. did not tell Sears anything directly. 12RP 92. Lettie, A.R. and Sears then had a conversation with Reyna in Reyna's apartment. 12RP 93, 116, 118. Reyna testified that A.R. did not tell her anything directly during that conversation. 12RP 118.

Reyna testified that after she was contacted by her daughter (Sears), she threw out defendant's clothing and told defendant he could no longer live there. 12RP 116-19. Reyna told defendant she was going to call the police. 12RP 119. Defendant told Reyna "it was a lie" and threatened to call immigration and take away D.R. if the police were involved. 12RP

[7] "Aunt Lettie" is Leticia Rodriguez. 12RP 25-26, 112.

119-20. Reyna did not call the police. 12RP 120. Afterwards, defendant would come by to see D.R., but he did not live with Reyna and A.R. again. 12RP 30, 120-21. Reyna testified that A.R. would hide whenever defendant came around. 12RP 121. *See also*, 12RP 32.

A.R. eventually told her mother about the abuse. 12RP 30-31. A.R.'s relationship with her mother became "awkward," and A.R. felt at times that Reyna did not believe her. 12RP 30-32. A.R. initially went to counseling for about a month but did not discuss the sexual abuse, because she "didn't know it was for that." 12RP 31. A.R. went to counseling again in 2014 to deal with the sexual abuse, because she was "tired of hiding it." 12RP 32-34.

Psychiatric nurse practitioner Jeovana Oshan testified that she saw A.R. in March of 2014 for a psychiatric evaluation. 13RP 54. At that time, A.R. reported dealing with depression, having "intrusive thoughts of past trauma," and being molested "when she was seven or eight years old." 13RP 54-55. As a mandatory reporter, Oshan reported A.R.'s disclosure of sexual abuse. 13RP 55. Police became involved after receiving a CPS referral in March of 2014. 13RP 81-82.

Clinical psychologist Laura Penalver-Vargas testified that she first saw A.R. in April of 2014 in response to Oshan's referral, and she saw A.R. intermittently through October of 2015. 13RP 69. During their intake

session, A.R. reported that she had been sexually abused as a child, and she reported various symptoms and difficulties subsequent to the abuse. 13RP 70-73. A.R. did not provide much detail regarding the acts of sexual abuse themselves. 13RP 73.

Defendant elected not to testify at trial and did not call any witnesses. 13RP 85; CP 165. A.R. and defendant have never been married or in a state registered domestic partnership. 11RP 58. A.R. identified defendant in open court. 11RP 61-62.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THE STATE'S WITNESSES GAVE IMPROPER OPINION TESTIMONY CONSTITUTING MANIFEST CONSTITUTIONAL ERROR, AS THE WITNESSES DID NOT COMMENT ON THE DEFENDANT'S GUILT OR THE VICTIM'S VERACITY.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington Constitution guarantee the right to a trial by jury. ***State v. Elmore***, 154 Wn. App. 885, 897, 228 P.3d 760 (2010). Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it invades the exclusive province of the jury." ***City of Seattle v. Heatley***, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); ***State v. Black***, 109 Wn.2d

336, 348, 745 P.2d 12 (1987). "Opinion testimony" means evidence that is given at trial while the witness is under oath and is based on one's belief or idea rather than on direct knowledge of facts at issue. ***State v. Demery***, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).

Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." ***Demery***, 144 Wn.2d at 760 (*quoting* ***Heatley***, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. ***Demery***, 144 Wn.2d at 758-59. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury and is based on inferences from the evidence is not improper opinion testimony." ***Heatley***, 70 Wn. App. at 578. The Supreme Court has required compliance with ER 103 before considering claims of improper admission of opinion testimony. ***Black***, 109 Wn.2d at 348.

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence, including opinion testimony,

will only be reversed for a manifest abuse of discretion.[8] ***State v. Aguirre***, 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010); ***State v. Young***, 158 Wn. App. 707, 243 P.3d, 172, 179 (2010); ***State v. George***, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." ***Demery***, 144 Wn.2d at 758. "That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds." ***Aguirre***, 168 Wn.2d at 359. However, such a decision may be affirmed on any ground the record adequately supports, even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The burden is on the appellant to "establish that the trial court abused its discretion." ***Demery***, 144 Wn.2d at 758.

a. Defendant failed to preserve the issue below.

When raised for the first time on appeal, a claim of improper opinion testimony will only be considered if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); ***State v. Kirkman***, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). "The defendant has the initial burden of showing that (1) the error was "truly of constitutional dimension" and (2)

[8] However, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. ***State v. Iniguez***, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). Claims of constitutional error are reviewed de novo. *Id.* at 281.

the error was "manifest." ***State v. Grimes***, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011) (*quoting* ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)).

"Manifest error" requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. ***Kirkman***, 159 Wn.2d at 926-27. In regards to improper opinion testimony, a defendant can show manifest constitutional error only if the record contains "an explicit or almost explicit witness statement on an ultimate issue of fact." ***Elmore***, 154 Wn. App. at 897-98 (*quoting* ***Kirkman***, 159 Wn.2d at 938). Courts construe the exception narrowly, because the decision not to object to such testimony may be tactical. ***Kirkman***, 159 Wn.2d at 934-35. Also important in a court's determination whether opinion testimony prejudiced a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues. ***Elmore***, 154 Wn. App. at 898 (*citing* ***State v. Montgomery***, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)). Even if a court determines the defendant's claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. ***Kirkman***, 159 Wn.2d at 927.

In the present case, defendant argues that (1) A.R.'s therapist, Laura Penalver-Vargas,[9] and (2) Detective Rackley gave improper opinion testimony during trial. Brief of Appellant at 17, 21. Because defendant did not object to the testimony at trial, he must demonstrate a manifest constitutional error. However, when the witnesses' actual statements are considered in the context of what was being discussed, it is apparent that they do not constitute improper opinion testimony. Thus, defendant is unable to show that any of the challenged statements constitute manifest constitutional error.

b. Therapist Vargas properly testified regarding A.R.'s report of sexual abuse and did not comment on A.R.'s veracity or defendant's guilt.

With regard to Vargas' testimony, defendant claims that Vargas' use of the terms "the [sexual] abuse," "experience," "trauma," and "event," etc. to describe A.R.'s report of sexual abuse all conveyed the belief that the abuse actually occurred. Brf. App. at 22. This claim fails. Vargas described what A.R. reported to her during their session(s) and never conveyed or offered an opinion as to the veracity of A.R.'s statements or the guilt of defendant. For the reasons set forth below, Vargas' unobjected-to testimony was proper.

[9] The witness indicated during trial that she could be referred to as "Ms. Vargas." 13RP 65. Consistent with appellant's opening brief, she will be referred to as "Vargas" herein. *See* Brief of Appellant at 8 (fn. 2).

During motions in limine, the parties discussed the anticipated testimony of psychiatric nurse practitioner Jeovana Oshan and clinical psychologist Laura Penalver-Vargas. 7RP 65-72; CP 165. The State argued that A.R.'s statements to Oshan and Vargas were admissible as statements made for purposes of medical diagnosis or treatment. 7RP 65-66. Defense counsel argued that although a hearsay exception may exist to allow the testimony, he did not feel the testimony was relevant, and "all it's really doing is repeating what's already been said, which...I believe to be a form of bolstering and cumulative." 7RP 66-69. Defense counsel did not argue that the anticipated testimony called for improper opinion testimony. The court ruled that A.R.'s statements to her treatment providers were admissible as statements made for the purpose of medical diagnosis or treatment under ER 803(a)(4), and the providers' testimony did not constitute improper bolstering. 7RP 70-72. The court also ruled that the diagnoses and treatment recommendations were not admissible. 7RP 70.

During trial, before the State called Vargas as a witness, the parties again discussed the limitations to Vargas' expected testimony. 13RP 59-64. Defense counsel agreed,

> Well, I think she's testifying under the exception that it is for diagnosis and treatment. And so essentially what went into that that is relevant to the crimes that are charged is where I think as a general sense the limits are. **So the incidents of abuse that [A.R.] has reported, I suppose, do come in**...[and] certainly dates when it happened...**I**

> **think so long as it's limited to the specific incidences that are complained about that she went into for diagnosis and treatment, that's where the line is.**

13RP 59-60 (emphasis added). Again, defense counsel did not argue that any portion of Vargas' anticipated testimony constituted improper opinion and did not make an "improper opinion" objection. The trial court again affirmed that Vargas could not testify as to any medical diagnosis made, but rather, "[should] just keep it to the history and things relevant to the charge." 13RP 60.

Vargas testified regarding her background and experience in clinical psychology and her session(s) with A.R. 13RP 64-76. Consistent with the trial court's ruling, Vargas testified about A.R.'s report of prior sexual abuse. 13RP 69-76. During her testimony, the following exchange occurred:

> [State]: Now in your first session with [A.R.], did she give you any information about prior sexual abuse?
>
> [Vargas]: Yes...**[A.R.] reported** that she had been sexually abused when she was a child around seven or eight years old.
>
> [State]: And did she report any associated difficulties or feelings surrounding that?
>
> [Vargas]: **She described symptoms** that – **she described many challenges and difficulties** subsequent to **her report of that abuse**.

[State]: And other than subsequent challenges and difficulties, did she describe any emotional symptoms that were relevant to your treatment of her regarding the abuse?

[Vargas]: Yeah. **[A.R.] reported symptoms** of depression **which she stated started after that event, after that experience**, increased irritability, anger outbursts, sort of mood dysregulation...challenges with family members...sort of a host of things related to anxiety and depression. **And then also talked about** kind of reliving the experience, so just kind of reliving the trauma.

[State]: What do you mean by that, reliving the experience of trauma?

[Vargas]: Just kind of flashbacks to some of those experiences that interrupted her daily life, so feeling anxious, worried, those kind of things as a result.

[State]: And **were all of those statements by her** important to your treatment of her?

[Vargas]: Yes.

...

[State]: Did you speak with [A.R.] about the sexual abuse in sessions past your first intake session?

[Vargas]: Yes. The abuse was sort of the context in which pretty much all of our sessions occurred. It was something that was brought up in some context or in some form during all of our – each of our sessions.

13RP 70-72, 75-76. Defense counsel did not object to any of the above testimony. Vargas further testified that A.R. *reported* that "when she disclosed the abuse...there was not a response...that family member just did not report it to the authorities or take any action to stop it." 13RP 72-73 (emphasis added). Again, defense counsel did not object.

During cross-examination, defense counsel asked:

> [Defense]: Did everything about her relationship with her mother derive from the alleged abuse or were there other issues with her mother as well that you were trying to address?
>
> [Vargas]: We dealt with the relationship in general, which was very complicated. At the core was kind of this experience of trauma and how her mom responded and the impact of that. A lot of our work was about how that was impacting her current functioning.

13RP 74. Defense did not object to Vargas' response and did move to strike her testimony.

First, defendant failed to preserve the issue of Vargas' allegedly improper testimony below. Defense counsel objected to Vargas' testimony during preliminary motions in limine as not relevant, cumulative, and bolstering. 7RP 66-69. *See also,* CP 83-95. Counsel did not object to the testimony on the basis of improper opinion testimony. Counsel later agreed that A.R.'s reports of abuse to Vargas were admissible. 13RP 59-60. Counsel did not object to the substance of

Vargas' testimony during trial. *See* 13RP 65-76. A party may only assign error on appeal based on the specific ground of the evidentiary objection at trial. ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). *See also,* ***State v. Ruiz***, 176 Wn. App. 623, 644, 309 P.3d 700 (2013); ***State v. Fleming***, 155 Wn. App. 489, 498, 228 P.3d 804 (2010) (a party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence).

Second, defendant fails to show manifest constitutional error. In ***Kirkman***, the Washington Supreme Court considered whether a doctor had provided improper opinion testimony when he testified that nothing in his physical examination made him doubt (or confirm) what a sexual abuse victim said and that the victim's report of sexual touching was clear and consistent with "lots of detail." ***Kirkman***, 159 Wn.2d at 929-30. The ***Kirkman*** court reasoned that a witness or victim may "clearly and consistently" provide an account that is false and, therefore, the doctor's statements did not constitute an opinion on the victim's credibility. *Id.* at 930. The doctor "did not come close" to testifying that he believed the victim's account or that the defendant was guilty. *Id.* Accordingly, the

court held that the alleged error was not a manifest error of constitutional magnitude.[10] *Id.*

In ***State v. Jones***, 71 Wn. App. 798, 803-04, 863 P.2d 85 (1993), the child victim told a CPS caseworker that Jones sexually abused her. Jones did not object to the testimony that the child told the caseworker, "[b]elieve me, believe me, I am telling you that this happened" or the caseworker's reply, "I believe you." ***Jones***, 71 Wn. App. at 804, 812. The court held that in context, the caseworker's testimony was an effort to reassure the child to encourage her to respond and was not a statement to the jury that the caseworker believed the child. *Id.* at 812-13. Because there was no objection to the testimony and the caseworker did not expressly state to the jury that she believed the child victim, Jones could not raise the issue for the first time on appeal. *Id.*

This case is analogous to ***Kirkman*** and ***Jones***. Here, Vargas testified regarding what A.R. reported to her, not what Vargas herself believed to be true. Her testimony commented on neither defendant's

[10] The court also noted, "Cases involving alleged child sex abuse make the child's credibility 'an inevitable, central issue,'" and "[w]here the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony." ***Kirkman***, 159 Wn.2d at 933 (internal citations omitted). "[E]ven if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it," and [j]uries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." ***State v. Kirkman***, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Indeed, "[t]he assertion that the province of the jury has been invaded may often be simple rhetoric." *Id.*

guilt nor A.R.'s veracity. Instead, she described the counseling protocols and guidelines she follows and recounted A.R.'s report of sexual abuse without stating that she believed A.R. Her testimony was not based on her own beliefs or ideas, but rather concerned the statements A.R. made for purposes of treatment. Vargas "did not come close" to testifying that she believed the victim's account or that the defendant was guilty. *See* ***Kirkman***, 159 Wn.2d at 930. Rather, she testified as to her methodology and the focus of her session(s) with A.R.

Moreover, the court in ***Kirkman*** concluded there was no prejudice in that case in large part because, despite the allegedly improper testimony on witness credibility, the jury was properly instructed that jurors are the "sole judges of the credibility of witnesses" and "are not bound" by expert witness opinions. ***Kirkman***, 159 Wn.2d at 937. Virtually identical instructions were given in this case. CP 101-125 (Instruction Nos. 1 and 4); 14RP 16, 19-20. This Court should presume the jury followed the trial court's instructions absent evidence to the contrary. ***Kirkman***, 159 Wn.2d at 928.

Defendant cites to ***State v. Black***, 109 Wn.2d 336, 745 P.2d 12 (1987), in support of his argument, but defendant's reliance on that case is misplaced. *See* Brf. App. at 21. In ***Black***, a direct opinion on the credibility of the victim was given when the State's expert testified,

"There is a specific profile for rape victims and [the alleged rape victim] fits in." ***Black***, 109 Wn.2d at 339. The witness gave an opinion on the veracity of the victim's allegations against the defendant, thus commenting on the defendant's guilt. Here, Vargas' testimony commented on neither defendant's guilt nor A.R.'s veracity.

The record here demonstrates that at no point did Vargas comment on, much less vouch for, the credibility of A.R. She properly testified regarding A.R.'s report of abuse. Defendant is unable to show Vargas' statements were improper opinion testimony constituting manifest constitutional error.

However, should this Court disagree and find that defendant has shown manifest constitutional error, then any error was harmless. Constitutional errors may be harmless. ***State v. Moses***, 129 Wn. App. 718, 732, 119 P.3d 906 (2005); ***Guloy***, 104 Wn.2d at 425. A constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable juror would have reached the same result in the absence of the error. ***State v. Quaale***, 182 Wn.2d 191, 202, 340 P.3d 213 (2014); ***Guloy***, 104 Wn.2d at 425-26. The State must show the untainted evidence of guilt was so overwhelming as to necessarily lead to a guilty verdict. ***State v. Frost***, 160 Wn.2d 765, 782, 161 P.3d 361 (2007); ***Guloy***, 104 Wn.2d at 426.

Here, even if this Court finds that Vargas provided improper opinion testimony, any error was harmless. The remaining untainted evidence, which the jury found to be credible, necessarily leads to a finding of guilt. The State presented the victim, A.R., who identified defendant and provided unrefuted testimony regarding defendant's molestation. Psychiatric nurse practitioner Oshan testified that during her intake evaluation, A.R. reported dealing with "depression," "intrusive thoughts of past trauma," and past molestation. 13RP 53-55. Their testimony is not challenged on appeal. Defendant did not call any witnesses. Given the evidence presented and the fact that Vargas' testimony added little, if any, evidence to prove the elements of the charges against defendant, any error was harmless.

c. Detective Rackley properly testified regarding the process of his investigation and did not comment on A.R.'s veracity or defendant's guilt.

Defendant argues that Detective Rackley also gave improper opinion testimony during trial when he stated that "children that are involved as victims or witnesses of certain types of crimes" are interviewed by "trained interviewers." Brf. App. at 22-23. Defendant did not object to the testimony during trial. As argued below, Detective

Rackley's testimony was not improper opinion testimony, and defendant cannot show manifest constitutional error to merit review.

Opinion testimony by a law enforcement officer may be especially prejudicial because the officer's testimony carries a "special aura of reliability," but it is not improper when a law enforcement officer testifies to protocol used during an investigation. ***Kirkman***, 159 Wn.2d at 928, 930-31. In ***Kirkman***, the court held that a detective's testimony as to the interview protocol he employed was not improper opinion testimony. *Id.* at 931. Such testimony does not carry a "special aura of reliability." *Id.*

In this case, Detective Rackley testified about the protocol used during the investigation. The following exchange occurred during direct examination:

[State]:	Now, when you initiate an investigation, what did you do in this particular case?
[Rackley]:	I contacted the victim, her mother, and eventually the other people involved, witnesses and suspects.
[State]:	Now, did you personally interview the victim?
[Rackley]:	No.
[State]:	How did that work?
[Rackley]:	Here in Pierce County, children that are involved as victims or witnesses of certain types of crimes are interviewed by the Child Advocacy Center by trained interviewers.

[State]: And did that occur in this case?

[Rackley]: Yes, it did.

[State]: Did you observe that interview?

[Rackley]: Yes.

[State]: And besides the victim, did you speak with other people related to this investigation?

[Rackley]: I spoke with the victim's mother. I spoke with her older sister.

13RP 82-83.

This placed Detective Rackley's statements in context as being part of the investigation he conducted, not personal expressions of A.R.'s credibility. He explained the process used to interview child victims and witnesses in Pierce County. Detective Rackley did not comment on the credibility of A.R. and never stated or implied that he believed defendant to have molested A.R. The credibility and truthfulness of A.R. remained a matter for the jury to determine. Again, the jury was instructed, both orally by the Judge and in the written packet of instructions, that they are the sole judges of credibility. CP 101-125 (Instruction No. 1); 14RP 16.

Detective Rackley's testimony was not improper opinion testimony. Rather, it concerned his process of investigation. Detective Rackley's testimony did not result in manifest constitutional error, and having failed to object, defendant cannot obtain review of the detective's

testimony for the first time on appeal. However, should this Court accept review of defendant's unpreserved claim, defendant is still not entitled to relief.

Again, the victim, A.R., testified regarding defendant's molestation. State's witness Keri Arnold, a trained forensic child interviewer, testified that she interviewed A.R. at the Children's Advocacy Center. 13RP 14, 20-21. This testimony is not challenged on appeal. Detective Rackley's testimony added little, if any, evidence to prove the elements of the charges against defendant. The jury would have reached the same conclusion without admission of the detective's statements. Thus, the admission of Detective Rackley's challenged testimony was harmless beyond a reasonable doubt.

d. Reyna properly testified regarding why she brought A.R. to counseling and did not comment on A.R.'s veracity or defendant's guilt. Moreover, defendant fails to show prejudice from Reyna's objected-to testimony which the court promptly struck and instructed the jury to disregard.

Defendant also alleges that reversal is required because A.R.'s mother, Reyna, gave "improper opinion testimony showing that [Reyna] believed the teen." Brf. App. at 25. Defendant cites to two portions of Reyna's testimony where she stated: 1) she felt her life had come apart and wondered how she had not realized that "someone I trusted...had

done something like this," and 2) "How am I going to have someone who's abusing my daughter live there?" 12RP 116-17, 119; Brf. App. at 26. During trial, defense counsel objected to both comments, which the trial court promptly struck and instructed the jury to disregard. 12RP 117, 119.

"The fact that a witness has invaded the province of the jury does not, however, always require a new trial." ***State v. Hager***, 171 Wn.2d 151, 159, 248 P.3d 512 (2011). "A remark 'can touch on a constitutional right but still be curable by a proper instruction.'" *Id.* (quoting ***State v. Smith***, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001)). "Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." ***Montgomery***, 163 Wn.2d at 595. *See also,* ***Hager***, 171 Wn.2d at 160 (curative instruction sufficient to cure detective's improper characterization of defendant as "evasive").

Here, the trial court sustained defendant's objections to Reyna's statements and promptly instructed the jury to disregard them. By striking the comments and instructing the jury, the court alleviated any prejudice they might have caused. In addition to giving this oral instruction, the trial court presented the jurors with a written instruction that they were "the sole judges of... credibility" and that, if they had been directed to disregard any evidence, they must not consider it in reaching their verdict.

CP 101-125 (Instruction No. 1). *See also*, 14RP 16. It is presumed that the jury followed these instructions. ***Kirkman***, 159 Wn.2d at 928.

Notably, defense counsel did not request an alternative curative instruction or move for a mistrial. Defendant now argues that Reyna's testimony was so prejudicial that his conviction must be reversed. As articulated by the court in ***State v. Dickerson***, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993), counsel's failure to move for a mistrial is important for two reasons:

> First, the trial court is clearly in a much better position than an appellate court operating from a cold record to evaluate whether a remark can be cured by admonition or requires a mistrial based on the whole flow of the trial and context of the remark. Second, defense counsel should not be entitled to speculate on the possibility of a favorable jury verdict and then, in the case of conviction, argue that the case should never have gone to the jury in the first place...[T]here may, indeed, be sound tactical reasons not to request a mistrial even when the defendant is entitled thereto.

Here, defense counsel was in the best position to hear the testimony, observe the jury, and determine tactically whether a request for a mistrial was appropriate based on the flow of the trial and context of the remark(s). Counsel did not, apparently, deem that a request for a mistrial was warranted. Defendant does not now allege ineffective assistance of counsel for failing to request a mistrial after Reyna's testimony.

Therefore, defendant cannot show that Reyna's testimony was so prejudicial as to require reversal.

Finally, defendant argues, "Over defense objection, Reyna would tell the jury that she took A.R. to Oshan because she wanted A.R. to be able to 'express what she felt' about her mom not believing her and blaming Reyna for the alleged abuse."[11] Brf. App. at 27. However, review of the record shows that defense counsel did not object to this line of questioning on redirect. Rather, during cross-examination, defense asked Reyna whether she and A.R. "used to fight a lot" and "say things about each other that you'd regret." 12RP 129-30. He then asked whether Reyna took A.R. to counseling in 2014 in the hope that they could

[11] Defendant also mentions that "[t]he prosecutor then elicited from Reyna that she told Alvarez she was throwing him out when he came home from work based on what the 'girls' had told her." Brf. App. at 27. It is unclear if defendant is arguing that this statement also constitutes improper opinion testimony. To the extent that this is part of his argument, defendant did not object below and therefore must demonstrate manifest constitutional error. *See* RAP 2.5(a)(3); ***Kirkman***, 159 Wn.2d at 927. This was not improper opinion testimony. Reyna did not convey that she believed A.R. or vouch for A.R.'s credibility. Viewed in context, Reyna referred to what the "girls" told her only to explain why she threw defendant out of her home which, in turn, explained defendant's subsequent response and threat to call immigration if she contacted police. 12RP 119-20. Reyna provided a timeline of events and did not comment on the truthfulness of A.R. or defendant's guilt. The fact that testimony helps *support* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. ***Heatley***, 70 Wn. App. at 579. "[T]estimony that is not a *direct* comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *Id.* at 578 (emphasis added). Manifest error requires a nearly explicit statement by the witness on an ultimate issue of fact. ***Kirkman***, 159 Wn.2d at 936. Here, there was no such statement. Defendant is unable to show manifest constitutional error. Moreover, any error was harmless for the same reasons set forth in this section as well as the preceding sections.

improve their relationship. 12RP 130. In response to this line of questioning, the prosecutor asked on redirect:

> [State]: Defense counsel asked you about why you took [A.R.] to counseling in 2014. Was improving your relationship with A.R. the only reason you brought her to counseling or were there other reasons also?
>
> [Reyna]: Well, that was one of the reasons. One of the reasons was because I wanted her to express what she felt. She felt that I didn't believe her...And so I took her there so that she could get what she had inside out and so that she could study better at school, she could be a better student, so she wouldn't be missing school. Because she told me because of all this turmoil, she wasn't able to concentrate at school.

12RP 136-36. Defense counsel did not object to this testimony.[12]

Reyna did not comment on the credibility of A.R. and neither stated nor implied that she believed defendant molested A.R. Rather, Reyna testified that A.R. *felt* that Reyna did not believe her. 12RP 135-36. The above testimony did not constitute improper opinion testimony. Reyna merely explained the reasons why she brought her daughter to counseling. Defendant opened the door to this line of questioning during

[12] Defendant cites to his written motions in limine in support of his argument that defense counsel objected to the testimony of Reyna as cumulative, improper bolstering, and serving to "inflame the jury [and] their sympathies." Brf. App. at 25 (citing CP 93-95). Defendant's motions in limine sought to exclude testimony from Reyna regarding A.R.'s disclosure of abuse. CP 94-95. However, defendant did not move to exclude testimony regarding why Reyna brought A.R. to counseling, and he did not specifically argue that such testimony constituted improper opinion testimony. Again, a party may only assign error on appeal based on the specific ground of the evidentiary objection at trial. ***Guloy***, 104 Wn.2d at 422.

cross-examination.[13] *See* 12RP 129-30. Again, defendant failed to object to Reyna's testimony and cannot show that the testimony was improper or prejudicial. Defendant fails to show that Reyna's testimony regarding why she brought A.R. to counseling constitutes manifest constitutional error to merit review.

The case ***State v. Johnson***, 152 Wn. App. 924, 219 P.3d 958 (2015), cited by defendant, is distinguishable from the present matter. In ***Johnson***, the trial court admitted out-of-court statements attributed to the defendant's wife that conveyed her belief that the victim told the truth regarding defendant's molestation. ***Johnson***, 152 Wn. App. at 931. Specifically, the trial court allowed testimony related to the defendant's wife's reaction after the victim described the defendant's penis and unique masturbation technique. *Id.* at 932-33. The improper testimony included statements that defendant's wife "freaked out," "became hysterical," "said it was true," and "acknowledged" that the victim had to be telling the truth. *Id.* The victim testified that the defendant's wife "started crying and flipped out even more and told me I was right" and then apologized to the victim for not believing her. *Id.* at 933.

[13] "Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness." ***State v. Gallagher***, 112 Wn. App. 601, 610, 51 P.3d 100 (2002).

This case is not like ***Johnson***. In ***Johnson***, the testimony was improper because it commented directly on the defendant's guilt. The statements were explicit. Here, Reyna did not testify that A.R.'s allegations were true. She did not testify that she believed A.R. or that defendant was guilty. Rather, she explained why she brought A.R. to counseling, a topic defendant raised during cross-examination. Reyna did not offer or express her own opinion.

Manifest error requires a nearly explicit statement by Reyna of defendant's guilt or A.R.'s veracity. ***Kirkman***, 159 Wn.2d at 936. Defendant fails to show manifest constitutional error. Moreover, a reasonable jury would have reached the same result in the absence of any error. A.R. testified, without objection, that she went to counseling and felt that her mother did not believe her. 12RP 31-35. For this reason, as well as the reasons set forth in the preceding sections, any error was harmless.

2. THE PROSECUTION'S ARGUMENT AND QUESTION WERE NEITHER MISCONDUCT NOR ERROR AND DID NOT CAUSE PREJUDICE.

To prove that a prosecutor's actions constitute misconduct, a defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815,

820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. ***State v. Warren***, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); ***Stenson***, 132 Wn.2d at

727. An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. ***Warren***, 165 Wn.2d at 30. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. ***Jones***, 71 Wn. App. at 808.

A prosecutor is, however, allowed to argue that the evidence does not support a defense theory. ***Russell***, 125 Wn.2d at 87; ***State v. Lindsay***, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87. And, a prosecutor may also argue credibility of witnesses. ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness.).

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been

neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719 (*citing* ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). "Accordingly, reviewing courts focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction." ***State v. Smiley***, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims that the State committed reversible misconduct by shifting the burden of proof during closing argument and deliberately eliciting excluded evidence. *See* Brf. App. at 30-37. For the reasons set forth below, defendant fails to demonstrate that the prosecutor's actions were either improper or prejudicial.

a. <u>The prosecutor's argument did not shift the burden of proof as she appropriately argued that the jury could draw a permissive inference of sexual gratification based on the evidence presented at trial</u>.

Due process requires the State to bear the burden of proving every element of the crime beyond a reasonable doubt. ***State v. Hanna***, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). An argument that shifts the State's

burden to prove guilt beyond a reasonable doubt constitutes misconduct. ***State v. Thorgerson***, 172 Wn.2d 438, 453, 258 P.3d 43 (2011); ***State v. Gregory***, 158 Wn.2d 759, 859-61, 147 P.3d 1201 (2006), *overruled on other grounds by* ***State v. W.R., Jr.***, 181 Wn.2d 757, 336 P.3d 1134 (2014). "A mandatory presumption instructs the jury that it '*must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.'" ***Hanna***, 123 Wn.2d at 710 (*quoting* ***County Court of Ulster Cy. v. Allen***, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225, 60 L. Ed. 2d 777 (1979)). These can run afoul of a defendant's due process rights if they serve to relieve the State of its obligation to prove all of the elements of the crime charged. ***State v. Deal***, 128 Wn.2d 693, 699, 911 P.2d 996 (1996).

The State may, however, use evidentiary devices, such as inferences and presumptions, to assist it in meeting its burden of proof. ***Hanna***, 123 Wn.2d at 710. A permissive inference or presumption permits, but does not require, the jury to infer an element of the offense, an "elemental" or "presumed" fact, from an "evidentiary" or "proved" fact. *Id.* Such a permissive inference does not relieve the State of its burden of proof, because the State must still convince the jury the suggested conclusion should be inferred from the proven facts. *Id.* When such an inference is only part of the State's proof supporting an element and not the "sole and sufficient" proof of such element, due process is not

offended if the State shows that the inference more likely than not flows from the proven fact. ***State v. Brunson***, 128 Wn.2d 98, 107, 905 P.2d 346 (1995).

Defendant in the present case argues that the State improperly shifted the burden of proof by urging the jury to presume the essential "sexual gratification" elements of the charged crimes. Brf. App. at 34-35. First, defendant did not object to any of the allegedly improper arguments during the State's closing. Without a proper objection made at trial, defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have corrected the possible resulting prejudice. ***Gentry***, 125 Wn.2d at 596; ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Defendant fails to make this showing.

Second, review of the record demonstrates that the State's closing argument did not shift the State's burden to prove guilt beyond a reasonable doubt. Rather, the prosecutor emphasized that the State carried the burden of proof and properly argued permissive inferences in conjunction with the evidence presented at trial to prove defendant's intent.

Here, the prosecutor began her closing argument by reminding the jury that the State bore the burden of proving its case beyond a reasonable doubt.

> But first I want to talk to you about an important principle in a criminal case, and that's the State's burden. You've heard now several times that the State has the burden of proving to you beyond a reasonable doubt that crimes occurred, and that is absolutely true. The Defense does not have a burden to prove anything. The entire burden is on the State.
> ...
> So what does the State have to prove here? The Defendant is charged with four counts of Child Molestation in the First Degree. And the exact things that the State has to prove are contained in the elements of the crime. And so I want to turn to Jury Instruction No. 9 which contains the elements of Count I, Child Molestation in the First Degree.

14RP 29-30.

The prosecutor discussed the State's burden to prove that defendant had "sexual contact" with A.R. 14RP 35; CP 101-125 (Instruction No. 9). The prosecutor referred the jury to the jury instruction that defined "sexual contact." 14RP 35; CP 101-125 (Instruction No. 8).

> Instruction No. 8 says: "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party."
> So what does that mean? Well, touching is sexual. It's not an accident. We're not talking about somebody accidently touching a child when you're roughhousing or touching a child because you're helping them with hygiene or because there's a medical issue. We're talking about purposeful adult sexual touching for a reason that has to do with somebody's sexual desires.

14RP 35-36. These comments alone demonstrate that the prosecutor did not argue a mandatory presumption of sexual gratification. Rather, the prosecutor distinguished that touching of the sexual or other intimate parts

could be accidental, for hygiene purposes, or for medical reasons and therefore *not* for sexual gratification.

The prosecutor then argued why the jury should draw a permissive inference of sexual gratification in this case:

> So for this time period, Count I, when we're talking about a time period [A.R.] describes when she's approximately 6, what is the touching we're talking about? Well, we're talking about an adult man putting his hand down the pants of an approximately 6-year-old girl. There's no reason for that type of behavior **here** other than for sexual purposes. There's not an accident. That type of behavior is sexual.

14RP 36 (emphasis added). The prosecutor discussed the evidence presented at trial that defendant put his hand down A.R.'s pants and touched her pubic area and bottom, and this touching occurred eight to ten times. 14RP 34-35, 37. The prosecutor asked the jury to return a verdict supported by the *evidence*. 14RP 47 (emphasis added).

Defense counsel did not object to this argument, but rather responded to it during his own closing argument. 14RP 50-51. Whereas the State argued that the evidence supported the inference of sexual gratification, defense argued there existed a lack of evidence. *Id.* The State then responded during its rebuttal argument:

> **Now, the instructions explain the concept of sexual gratification**. We're not talking about sexual climax or the actual act of sexual intercourse. We're talking about something that's done for sexual purposes. And people do a lot of things for sexual purposes. And it may not be what

> you think of as typical behavior, but it doesn't mean it's not for sexual gratification. Some people expose themselves for sexual gratification. It may not make sense to other people, but it happens. And [A.R.] as a 6- and 10-year-old is not going to be able to observe -- she's just not going to be able to fathom -- be capable of observing with the knowledge that an adult has things that might clue you in to the person getting something sexually satisfying out of this exchange. It's just not going to happen. But the only reason an adult would stick their hand down someone's pants and rub their vaginal area is for sexual gratification purposes.

14RP 78 (emphasis added). Again, defendant did not object. The prosecutor had previously argued that at the Chateau Rainier apartment, defendant touched A.R.'s vagina between her legs, picked her up, brought her into the bedroom, touched her vagina again, touched her bottom, and tried to press his fingers into her. 14RP 27-28. *See also*, 12RP 18-25. The above argument that the jury could reasonably infer sexual gratification based on defendant's act of putting his hand down A.R.'s pants and rubbing her vaginal area clearly referred to the evidence presented regarding the Chateau Rainier incident. The prosecutor again asked the jury to return verdicts supported by the *evidence*. 14RP 80 (emphasis added).

The prosecutor did not misstate the evidence and improperly mix the multiple instances of molestation together by arguing that each instance involved the "rubbing" of A.R's vagina, as argued by defendant. *See* Brf. App. at 33. Rather, the prosecutor specified that Counts I-III

involved the instances where defendant put his hand down A.R.'s pants and rested it on her pubic area and "[h]is hand doesn't move." 14RP 34, 37. The prosecutor also distinguished that Count IV involved the incident at the Chateau Rainer apartment where the touching was "different." 14RP 27-28, 39. An appellate court reviews a prosecutor's comments during closing argument in the context of the *total* argument and the evidence addressed in that argument. ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (emphasis added).

The State has wide latitude to argue inferences from the evidence. ***State v. Pierce***, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Here, the prosecutor's argument did not impermissibly shift the burden to the defense. The argument was based on the evidence. The prosecutor did not argue that the defense had failed to offer another reasonable explanation for defendant's touching of A.R. Rather, when viewed in the context of the whole argument, the prosecutor argued that the evidence did not support any other reasonable explanation. The prosecutor asked the jury to return a verdict of guilty based on the *evidence*. 14RP 47, 80.

The trial court also properly instructed the jury that the attorneys' statements were not evidence and that they were to rely only on the evidence produced at trial during their deliberations. 14RP 15, 17; CP 101-125 (Instruction No. 1). *See* ***Dhaliwal***, 150 Wn.2d at 578 (court also

reviews prosecutor's comments during closing argument in context of the jury instructions). Juries are presumed to follow their instructions. ***State v. Stein***, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The State properly asked the jury to draw the inference that the defendant's touching of A.R. was done for the purpose of sexual gratification, because that inference flows from the evidence presented at trial. A jury may infer sexual gratification from the circumstances of the touching itself, where those circumstances are unequivocal and not susceptible to innocent explanation. *See* ***State v. Whisenhunt***, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (defendant's conduct was not susceptible to innocent explanation when he touched victim's genital area over her clothes on three separate occasions); ***State v. Harstad***, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (evidence that unrelated adult with no caretaking function touched intimate parts of child supports inference of touching for purpose of sexual gratification). Here, defendant touched A.R.'s genital area under her clothing on eight to ten separate occasions, and he touched A.R.'s vagina and attempted to insert his fingers into her bottom (through her clothing) on another occasion. 11RP 71-73; 12RP 9-11, 19-25. Because the State's argument properly focused on the evidence, defendant cannot show prosecutorial misconduct.

Moreover, defendant did not object to the prosecutor's remarks. The absence of a timely objection to a prosecutor's statement "suggests that it was of little moment in the trial." ***State v. Rogers***, 70 Wn. App. 626, 631, 855 P.2d 294 (1993). A defendant cannot remain silent, speculate on a favorable verdict, and, when it is adverse, use the alleged misconduct to obtain a new trial on appeal. ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Here, defendant waived any claim of error by failing to object. Defense counsel instead chose to respond to the State's argument. 14RP 50-51. The State, in turn, responded to defense's argument that there was no evidence of sexual gratification and no "indication that [defendant] got anything out of this." 14RP 50; *see* 14RP 78. The prosecutor was thus entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

Additionally, none of the State's allegedly improper statements were of such flagrant nature that any potential prejudice could not have been obviated by a further curative instruction had the defendant requested one. *See* ***State v. Hoffman***, 116 Wn.2d 51, 94, 804 P.2d 577 (1991). The State's argument was not improper and did not relieve the State of its burden. It appropriately argued a permissive inference in accordance with the law.

b. The prosecutor's question was not improper and defendant fails to show prejudice.

Next, defendant claims that the prosecutor committed misconduct by deliberately eliciting excluded evidence during her redirect examination of Keri Arnold. Brf. App. at 35-36. To prove prosecutorial misconduct, defendant must first establish that the question posed by the prosecutor was improper. ***Stenson***, 132 Wn.2d at 722. In addition, defendant must show that the question was not only improper, but also prejudicial in the context of the *entire record and circumstances at trial.* ***Thorgerson***, 172 Wn.2d at 442 (emphasis added). *See* ***State v. Weber***, 159 Wn.2d 252, 276, 149 P.3d 646 (2006) (defendant failed to prove that prosecutor's misconduct in eliciting testimony barred by pretrial ruling, to which he did not object, caused prejudice affecting the outcome of the trial).

During trial, outside of the presence of the jury, defense counsel asked to inquire of Keri Arnold on cross-examination regarding a prior inconsistent statement made by A.R. relating to her age at the time of the molestation at Chateau Rainer. 13RP 23. The State did not object, and the court allowed the inquiry. 13RP 23-24. The prosecutor then asked to follow up with Arnold regarding the context of A.R.'s statement. 13RP 24. The court indicated that the State could "try to rehabilitate related

strictly to the time frame" and stated, "So to the degree that you want to inquire of Ms. Arnold about this particular time frame and if you feel there's something Mr. Steinmetz hasn't covered, okay." 13RP 26. The State expressed concern that the jury would be left with the false impression that A.R. only disclosed one incident to Arnold. 13RP 26. The court then ruled,

> Well, the question should be so insofar as this specific incident is concerned, the one that was alleged at the Chateau, then you can ask your question. That would imply by the nature of the question that we're only dealing with this one, not the other ones. I'm not going to allow prior consistent statements because that's, first of all, not something -- a door that Mr. Steinmetz is opening, I guess, first and foremost. So let's keep it to Chateau Rainier.

13RP 26-27.

On cross-examination, defense counsel asked Arnold if A.R. indicated that she was seven or eight years old at the time of the alleged incident at the Chateau Rainer Apartments. 13RP 29. On redirect, the prosecutor asked Arnold if that was the only incident they spoke about during the interview. 13RP 30. Before Arnold answered, defense counsel objected, and the court sustained defense's objection as beyond the scope of cross-examination. 13RP 30. Defense counsel did not request a curative instruction or move for a mistrial. *Id.*

The record does not indicate that the prosecutor deliberately disregarded the court's ruling. The State did not ask about any prior

consistent statements made by A.R., which the court had excluded. Rather, the State attempted to clarify if the Chateau Rainier incident was the only "topic" discussed. 13RP 30.

Nevertheless, even if the prosecutor's question was improper, it was not prejudicial. It was a single, isolated question in the context of a lengthy trial. The trial court sustained defense's objection before the witness had a chance to answer. Defense counsel did not request a curative instruction. Any inference that there was more than one incident of molestation was cumulative since A.R. testified that the touching occurred on more than one occasion. 11RP 71-73; 12RP 9-11, 19-25. Because the allegedly improper question was not prejudicial and was unlikely to have affected the jury's verdict, reversal is not warranted.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO AMEND THE CHARGING DATE OF THE INFORMATION AND ADMITTING RES GESTAE EVIDENCE AT TRIAL, WHERE DEFENDANT WAS NOT PREJUDICED BY THE AMENDMENT AND THE RES GESTAE EVIDENCE PROVIDED A TIMELINE OF EVENTS AND DID NOT ENCOMPASS DISCLOSURE TESTIMONY.

a. The merits of assignments of error 6 and 7 should be summarily rejected due to defendant's failure to support them with any meaningful analysis.

Defendant assigns error to the "trial court allowing testimony from the accuser's mother and sister under the 'fact of the complaint' rule'" and

claims the "trial court abused its discretion" in allowing the State to amend the information during trial. *See* Brf. App. at 1 (Assignments of Error Nos. 6 and 7). However, defendant fails to argue or discuss these assignments of error in his brief. *See* RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record).

Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a). *See also,* ***State v. Stubbs***, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *reversed by* 170 Wn.2d 117 (2010) ("[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review").

Defendant assigns error to the trial court's decisions to allow the State to amend the information during trial and allow testimony under the "fact of the compliant" rule, then apparently abandons the claims by

failing to address them in the body of his opening brief. Defendant only discusses these issues in the context of ineffective assistance of counsel (as opposed to error by the trial court). *See* Brf. App. at 38-41. This Court should decline to review these assignments of error.

b. The trial court properly exercised its discretion in allowing the State to amend the information where the amendment only affected the charging date and there was no prejudice to defendant.

A trial court's decision to allow the State to amend an information is reviewed for abuse of discretion. ***State v. James***, 108 Wn.2d 483, 490, 739 P.2d 699 (1987); ***State v. Haner***, 95 Wn.2d 858, 864, 631 P.2d 381 (1981). Abuse of discretion occurs when the decision is manifestly unreasonable or the court exercised its discretion on untenable grounds or for untenable reasons. ***State v. Cunningham***, 96 Wn.2d 31, 34, 633 P.2d 886 (1981). Under the criminal court rules, a trial court may allow the amendment of the information at any time before verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). The defendant bears the burden to show prejudice. ***State v. Brown***, 74 Wn.2d 799, 801, 447 P.2d 82 (1968).

Here, defendant appears to assign error to the trial court's decision allowing the State to amend the information during trial. *See* Assignment of Error No. 7. During trial, after the testimony of A.R. and before the

State rested, the State moved to amend the time periods of the counts charged to reflect "when during that overall time period [A.R.] says that the acts of abuse took place." 13RP 5-6; CP 54-55, 96-97. The defense at trial was general denial; there was no alibi defense. 13RP 6-7. Defendant was unable to articulate any particular prejudice below.[14] *See* 13RP 6-9. The trial court found that ***State v. DeBolt***, 61 Wn. App. 58, 808 P.2d 794 (1991), controlled and accepted the filing of the State's Second Amended Information. 13RP 8-10; CP 54-55. For the reasons set forth below, the trial court did not abuse its discretion.

A criminal defendant is to be provided with notice of all charged crimes. ***State v. Schaffer***, 120 Wn.2d 616, 619, 845 P.2d 281 (1993). Under article 1, section 22 of the Washington Constitution, "the accused shall have the right...to demand the nature and cause of the accusation against him." Accordingly, a defendant cannot be tried for a crime not charged. *See* ***State v. Pelkey***, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). Pursuant to that provision, a criminal charge may not be amended after the State has rested its case-in-chief "unless the amendment is to a lesser degree of the same charge or a lesser included offense." *Id.* at 491.

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[14] Defense counsel stated, "I think the investigation would have been different and potentially that could have developed into something. Can I say specifically that would have developed into something? Of course not." 13RP 9. Defense counsel also argued there was "no possibility of an alibi defense" under either the First or Second Amended Information, because "there's a period of time that has been alleged." 13RP 7-8. Defendant did not object to the filing of the First Amended Information, which removed the domestic violence designation. 9RP 5; CP 96-97. Both the Original and First Amended Informations charged the same time periods. CP 1-3, 96-97. The Second Amended Information extended the end date of the charging periods. CP 54-55.

However, the amendment of a date contained in an information during trial has regularly been allowed, because it is usually not a material element of the crime. ***DeBolt***, 61 Wn. App. at 61-62; ***State v. Allyn***, 40 Wn. App. 27, 35, 696 P.2d 45 (1985); ***State v. Fischer***, 40 Wn. App. 506, 510-12, 699 P.2d 249 (1985).

In ***DeBolt***, the defendant was charged with two counts of indecent liberties. ***DeBolt***, 61 Wn. App. at 59. After the State had rested and the defendant had testified, the State moved to amend the time periods of the counts charged. *Id.* at 60. The trial court allowed one of the amendments finding that it "was highly technical, that the defense was not prejudiced, and the nature of the case was not changed." *Id.* The trial court also noted that there was no alibi defense as to any specific dates. *Id.*

The trial court's decision was upheld on appeal. *Id.* at 63. The ***DeBolt*** court noted,

> Cases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime. Therefore, amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant.

Id. at 61-62. The court also noted that "[c]hildren often cannot remember the exact date of an event, and in cases of sexual abuse, they may repress memory of that date." *Id.*

In the present case, the trial court did not abuse its discretion in allowing the State to amend the information relating to the charging period. The charges remained the same. The amendment did not compromise an alibi defense and defendant did not demonstrate substantial prejudice. ***DeBolt***, 61 Wn. App. at 62. The amendment of the charging period was a matter of form rather than substance. Here, as in ***DeBolt***, because defendant was on notice of the nature of the child molestation charges and the "crime charged" remained the same before and after the amendment, he cannot (and does not) show prejudice.[15] Because defendant fails to meet his burden, his claim of error fails.

c. Neither Sears nor Reyna testified regarding A.R.'s disclosure of abuse under the Fact of the Complaint Doctrine.

A trial court's decision on the admissibility of evidence may be reversed only on a showing of manifest abuse of discretion. ***State v. Ackerman***, 90 Wn. App. 477, 481, 953 P.2d 816 (1998). The "fact of the complaint" doctrine is a case law exception to the hearsay rule. ***Ackerman***, 90 Wn. App. at 481; ***DeBolt***, 61 Wn. App. at 63. *See also,* ***State v. Bray***, 23 Wn. App. 117, 121-22, 594 P.2d 1363 (1979) (the evidence "is not

[15] As discussed in the following section, any argument that the amended time period as to Count IV changed the timing of A.R.'s disclosures to her family from years to months later is moot, as no testimony was admitted during trial under the "fact of the complaint" doctrine. Moreover, the testimony from A.R. at trial was that she disclosed the abuse "a couple of months" after it happened. 12RP 25, 61.

hearsay because it is introduced for the purpose of bolstering the victim's credibility and is not substantive evidence of the crime"). It allows the State in a sex offense case to present evidence that the victim made a timely complaint to someone after the assault. ***Ackerman***, 90 Wn. App. at 481; ***State v. Ferguson***, 100 Wn.2d 131, 135, 667 P.2d 68 (1983). Evidence of the details of the complaint, including the identity of the offender and nature of the act, is excluded. ***Ferguson***, 100 Wn.2d at 136 (however, where identity is not an issue, testimony about the identity of the perpetrator is harmless error); ***State v. Murley***, 35 Wn.2d 233, 237, 212 P.2d 801 (1949). Such details are admissible only if allowed by other rules of evidence.

Here, defendant appears to assign error to the trial court "allowing testimony from the accuser's mother and sister under the 'fact of the complaint' rule." *See* Assignment of Error No. 6. Without providing a citation to the record, defendant claims that the trial court "ultimately ruled the [fact of the complaint] evidence admissible." Brf. App. at 39. Review of the record actually shows that neither A.R.'s mother (Reyna) nor her sister (Sears) testified regarding A.R.'s disclosure under the "fact of the complaint" doctrine, or any other doctrine or exception.

The State *initially* sought to introduce evidence of A.R.'s disclosure to Joanna Sears and Leticia Rodriguez (aka "Aunt Lettie") under the "fact of the complaint" doctrine. CP 43. *See also*, 7RP 22.

Defense counsel articulated that "as we get to any kind of individualized statements from particular witnesses, we're going to have to look and see if there are some exceptions that apply or not, and we'll deal with those as they come up." 7RP 24. The trial court agreed and reserved its ruling. 7RP 22-24.

A.R. testified that she told family friend "Aunt Lettie" about the abuse "a couple of months after it happened," and they told A.R.'s sister the next day. 12RP 25, 27, 61. Outside of the presence of the jury, the parties again discussed A.R.'s disclosure to Sears before Sears took the stand. 12RP 71-72. *See also,* 11RP 28-31. The State acknowledged that Sears was told of the sexual abuse by *Rodriguez*, not A.R. herself, and agreed that the State could not therefore ask Sears about what Rodriguez had told her. 12RP 71-72. The court also agreed and ruled that the statements were inadmissible hearsay.[16] 12RP 72-73.

Sears was *not* asked about the substance of A.R.'s disclosure, or even that there was a disclosure, during direct examination. *See* 12RP 90-94; 12RP 92 (A.R. did not talk directly to Sears). Leticia Rodriguez was not called as a witness.[17] CP 165. A.R.'s mother, Reyna, also was *not* asked about the substance of A.R.'s disclosure or whether there was a

[16] The court later denied the State's request to admit what Rodriguez told Sears under the excited utterance exception to the hearsay rule. 12RP 97-100.
[17] The court had indicated that Rodriguez's recounting of what A.R. told her would be admissible under the fact of the complaint doctrine. 12RP 100. Again, however, Rodriguez did not testify.

disclosure of abuse.[18] *See generally* 12RP 104-136. Therefore, no statements came in under the fact of the compliant doctrine. Because the challenged evidence was not admitted during trial, defendant's claim of error is moot.

What Sears and Reyna did testify to was properly admitted as res gestae and demeanor evidence. Sears testified that on one occasion, when A.R. was 10 or 11 years old, A.R. and Rodriquez came over to her home and they had a conversation. 12RP 90-92. A.R. was crying. 12RP 91-92. Soon after, the three of them had a conversation with Reyna, and again, A.R. was crying. 12RP 92-93. Reyna testified that when they lived at the Chateau Rainier apartment, she had a conversation with Sears, Rodriguez, and A.R. 12RP 115-16, 118. A.R. was 10 or 11 years old. 12RP 116. Reyna threw out defendant's clothes and later had a conversation with defendant. 12RP 118-19. Defendant threatened to call immigration and take their daughter away if Reyna contacted police. 12RP 119-20.

Testimony may be admissible as res gestae evidence if it "constitutes proof of the history of the crime charged." ***State v. Schaffer***, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (internal citation omitted). *See also*, ***State v. Lane***, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (res gestae evidence "'complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place'" (*quoting* ***State***

[18] *See* 12RP 118 (A.R. did not tell Reyna anything directly during the conversation).

v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981))); ***State v. Brown***, 132 Wn.2d 529, 591, 940 P.2d 546 (1997) (evidence that "constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense...is admissible [as res gestae evidence] 'in order that a complete picture be depicted for the jury.'" (*quoting* ***Tharp***, 96 Wn.2d at 594)).

Here, the trial court found the above testimony relevant and admissible. 12RP 72-73. Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). A fact bearing on the credibility or probative value of other evidence is relevant. ***State v. Rice***, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

The trial court did not abuse its discretion in allowing limited evidence concerning the surrounding circumstances of A.R.'s disclosure. Sears and Reyna's testimony provided context as to the time period A.R. disclosed the abuse to Rodriguez, and their testimony provided a timeline of relevant events. Sears' testimony also described the emotional state of A.R. which goes to A.R.'s credibility. Neither witness testified regarding the substance of any disclosure made by A.R. Accordingly, there was no error.

Moreover, defendant did not object to the witnesses' testimony regarding A.R.'s demeanor or the timing and surrounding circumstances of their conversations with Rodriguez. Before Sears testified, defendant objected to her testimony on a whole as cumulative, but he did not specifically object to the substance of her testimony during direct examination regarding the timeline of events and demeanor evidence. *See* 12RP 72, 90-93. Defendant also did not object to the substance of Reyna's testimony regarding the timeline of events. *See* 12RP 115-20.

In order to preserve an evidentiary challenge on appeal, a party must make a specific objection to the admission of the evidence before the trial court. ER 103; ***Ruiz***, 176 Wn. App. at 644; ***Fleming***, 155 Wn. App. at 498 (a party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence). Failure to do so precludes appellate review.[19] ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Thus, defendant failed to preserve the issue below.

To the extent this Court disagrees and finds the trial court improperly admitted evidence of A.R.'s disclosure of abuse, any error was harmless. Evidentiary error is grounds for reversal only if, "within

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[19] *But see,* RAP 2.5(a)(3) (appellate court may consider issue raised for the first time on appeal if a manifest error affecting a constitutional right). Here, there was no manifest constitutional error. Because there was no objection at trial and the error was not manifest, any alleged error was not preserved for appellate review.

reasonable probabilities, the error affected the outcome of the trial." ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." *Id.* A.R. testified at trial that she told Aunt Lettie about the abuse a couple of months after it happened, they told Sears the next day, and then they told Reyna. 12RP 25-30. Had Sears or Reyna's allegedly improper testimony not been allowed, the jury still would have heard the same information, but through A.R. In light of the evidence as a whole, any improper testimony from Sears and/or Reyna was of minor significance and reversal is not warranted.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT HE WAS PREJUDICED BY ANY DEFICIENCY.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and

prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must prove his counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). Trial counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance is *not* shown by matters that go to trial strategy or tactics. ***Garrett***, 124 Wn.2d at 520 (emphasis added). Rather, a defendant must show the "absence of any conceivable legitimate tactic explaining counsel's performance," and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (internal citation omitted); ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

"***Strickland*** begins with a 'strong presumption that counsel's performance was reasonable.'" ***Grier***, 171 Wn.2d at 42 (*quoting* ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Exceptional deference

must be given to counsel's tactical and strategic decisions. ***In re Elmore***, 162 Wn.2d 236, 257, 172 P.3d 335 (2007) (*citing* ***Strickland***, 466 U.S. at 689). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." ***Strickland***, 466 U.S. at 689.

The decision of when, whether and how to object, and what to argue are classic examples of tactical decisions. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (*citing* ***Strickland***, 466 U.S. at 763). Only in egregious circumstances will the failure to object constitute ineffective representation.[20] *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *See* ***State v. Carpenter***, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). Judicial scrutiny of a

[20] Ineffective assistance of counsel claims based on objections require the defendant to prove: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that the objection would have likely been sustained; and (3) that the result of the trial would have been different if the objection was successful. ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

Here, defendant claims that trial counsel's decision not to object to the prosecutor's comments during closing argument constitutes ineffective assistance. Brf. App. at 37-38. However, for the reasons set forth previously, the prosecutor's comments were not improper. *See* ***State v. Larios-Lopez***, 156 Wn. App. 257, 262, 233 P.3d 899 (2010) (because the prosecutor's arguments were not improper, defendant is unable to show his counsel's performance was deficient in failing to object to them). Therefore, defendant is unable to show his defense counsel was

ineffective for failing to object when there was no error.[21] Moreover, defense counsel's failure to object to the prosecutor's arguments may well have been a strategic choice to argue the absence of evidence of sexual gratification. *See*, 14RP 50-51. Because defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *See* ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Defendant also claims that trial counsel was ineffective by failing to properly argue the "fact of the complaint" doctrine, "which resulted in the trial court improperly admitting testimony from A.R.'s mother and sister" under that theory. Brf. App. at 38, 41. As argued in the preceding section, the trial court did not admit testimony from A.R.'s mother and sister under the "fact of the complaint" doctrine. Neither witness testified regarding A.R.'s disclosure of abuse. Moreover, defense counsel objected to any testimony from Sears regarding A.R.'s disclosure to Rodriguez as

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[21] In Question Presented No. 3 of appellant's opening brief, defendant appears to allege ineffective assistance of counsel for failing to object to improper opinion testimony. *See* Brf. App. at 3. However, defendant fails to discuss or argue this point in the body of his opening brief. *See* Brf. App. at 38-41 (argument regarding ineffective assistance of counsel). This Court should decline to review any claim of ineffective assistance for failing to object to improper opinion testimony, where defendant fails to identify the improper testimony, fails to reference relevant parts of the record, and fails to provide any analysis (let alone meaningful analysis). *See*, RAP 10.3(a)(6); ***Cowiche Canyon***, 118 Wn.2d at 809; ***Elliott***, 114 Wn.2d at 15; ***Saunders***, 113 Wn.2d at 345; ***Stubbs***, 144 Wn. App. at 652. Should this Court disagree and review defendant's abandoned claim, then defendant still is unable to show ineffective assistance of counsel. As discussed previously, the State's witnesses did not provide improper opinion testimony. Defense counsel was not ineffective for failing to object, because there was no error.

inadmissible hearsay. *See* 7RP 22-24 (objecting to any statements made by A.R. to others), 11RP 29-31, 12RP 72.

Defendant argues that trial counsel's failure to properly argue the "fact of the complaint" issue eventually resulted in the court allowing the State to amend the information during trial, and had counsel properly argued the issue, then "clear prejudice to Mr. Alvarez would have shown that this was an amendment of substance." Brf. App. at 41. However, the amendment concerned the charging date (i.e., when defendant molested A.R.), not the date of A.R.'s disclosure. *See* CP 54-55. Moreover, counsel objected to the amendment and argued that it prejudiced his client. 13RP 6-9. Counsel specifically mentioned the amendment to Count IV was problematic in regards to A.R.'s disclosure. 13RP 8. Although the trial court disagreed, counsel argued against amendment on behalf of defendant. *See, e.g.,* ***In re Pers. Restraint of Pirtle***, 136 Wn.2d 467, 489, 965 P.2d 593 (1998) ("even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation" of right to counsel). Although, in hindsight, defendant may have wanted counsel to argue the above issues differently or more forcefully, "[e]xceptional deference must be given to counsel's tactical and strategic decisions." ***Elmore***, 162 Wn.2d at 257.

After examining the whole record, it is apparent that defendant did not receive ineffective assistance of counsel. Counsel's performance is presumed effective. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Defendant is unable to meet his burden of showing

defense counsel's performance was deficient and that he was prejudiced by such deficiency.

5. DEFENDANT HAS NOT MET HIS BURDEN OF PROOF AS TO CUMULATIVE ERROR WHERE THERE WAS NO ERROR IN THE INTRODUCTION OF EVIDENCE, DEFENSE COUNSEL'S PERFORMANCE, AMENDMENT OR ARGUMENT.

Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors. ***State v. Venegas***, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe on the right to a fair trial. *Id.* (*citing* ***Weber***, 159 Wn.2d at 279, and ***State v. Hodges***, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003)). The cumulative error doctrine "does not apply where the errors are few and have little or no effect on the outcome of the trial." ***Weber***, 159 Wn.2d at 279. "The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary." ***State v. Yarbrough***, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

The first requirement for cumulative error is multiple, separate errors. Defendant has not sustained his burden as to this requirement. In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that

there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

6. THIS COURT SHOULD REMAND WITH ORDERS TO MODIFY SEVERAL COMMUNITY CUSTODY CONDITIONS IN APPENDIX H.

The Sentencing Reform Act of 1981 (SRA) authorizes the trial court to impose "crime-related prohibitions and affirmative conditions" as part of any sentence. RCW 9.94A.505; ***State v. Johnson***, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Community custody is generally required for those convicted of child molestation in the first degree and sentenced to the custody of the department of corrections. *See* RCW 9.94A.507 (former RCW 9.94A.712). When a court sentences an offender to a term of community custody, the court must sentence that offender to conditions of community custody listed in RCW 9.94A.703(1) and (2). The court must order the offender to comply with conditions imposed by the Department of Corrections (DOC). RCW 9.94A.703(1)(b); RCW 9.94A.030(17). The court may also order those conditions provided in RCW 9.94A.703(3).

Pursuant to RCW 9.94A.703(3), the trial court may impose as part of any term of community custody conditions that defendant:

> (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
> (c) Participate in crime-related treatment or counseling services;
> (d) Participate in rehabilitative programs or otherwise

> perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
> (e) Refrain from [] consuming alcohol; or
> (f) Comply with any crime-related prohibitions.

See former RCW 9.94A.703(3)(b)-(f); Laws of 2009, ch. 214, § 3.[22]

Whether a trial court has stautory authority to impose a community custody condition is reviewed de novo. ***State v. Armendariz***, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); ***Johnson***, 180 Wn. App. at 325. A community custody condition is beyond the court's authority to impose if it is not authorized by the legislature. ***State v. Warnock***, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). However, imposing statutorily authorized conditions of community custody is within the discretion of the sentencing court and is reviewed for abuse of discretion. ***State v. Bahl***, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); ***Johnson***, 180 Wn. App. at 326. The proper remedy for a condition not authorized by statute is to reverse that portion of the sentence and remand for resentencing of the improper condition. ***State v. Sansone***, 127 Wn. App. 630, 643, 111 P.3d 1251 (2005). Community custody conditions generally will be reversed only if their imposition is manifestly unreasonable.[23] ***State v. Valencia***, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

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[22] The current version of RCW 9.94A.703(3)(e) authorizes the trial court to prohibit a defendant from "*possessing or* consuming alcohol." (emphasis added).
[23] The imposition of an unconstitutional condition is manifestly unreasonable. ***Valencia***, 169 Wn.2d at 792; ***Bahl***, 164 Wn.2d at 753.

Defendant in the present case challenges four conditions of community custody imposed by the court in Appendix H of his judgment and sentence. Brf. App. at 42; *see also,* Assignment of Error No. 8; CP 154-156. Each challenge is addressed below.

a. This Court should remand to strike Conditions 15 and 27 and modify Condition 29 of Appendix H.

As part of his term of community custody, the court ordered defendant to comply with the condition that he "not enter into any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores." CP 155 (Condition 15). While RCW 9.94A.703(3)(e) allows the court to order defendant to refrain from consuimg alcohol, it does not expressly authorize the court to prohibit defendant from entering locations where alcohol is served or sold. The condition would therefore appear to fall within the trial court's authority to impose "crime-related prohibitions." RCW 9.94A.703(3)(f).

The court also ordered defendant to comply with the following conditions: "You are also prohibited from joining or peruisng any public social websites (Face book, Myspace, *Craigslist*, etc.), Skyping, or telephoning any sexually-oriented 900 numbers" and "Do not patronize prostitutes or any businesses that promote the commercialization of sex." CP 156 (Conditions 27 and 29). These too were apparently imposed as

"crime-related prohibitions" under RCW 9.94A.703(3)(f).

"A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (internal citation and emphasis omitted). *See also*, RCW 9.94A.030(10). A prohibition of conduct must be directly related to the crime but need not be causally related. ***Zimmer,*** 146 Wn. App. at 413. A community custody prohibition designed to prevent the offender from further criminal conduct of the type for which the offender was convicted can be crime-related. *See* ***State v. Riley***, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Generally, the court will uphold crime-related prohibitions if they are reasonably related to the crime. ***State v. Warren***, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Here, the State concedes that Condition 15 prohibiting defendant from entering locations where alcohol is the primary product (e.g., bars and taverns) is invalid, because there was no evidence that alcohol played a direct part in defendant's crimes. The condition does not reasonably relate to the circumstances of defendant's convictions for child molestation. As a result, the State agrees that this Court should remand with orders to strike Condition 15 from Appendix H of defendant's judgment and sentence.

The State also concedes that Condition 27 and part of Condition 29 are invalid. There was no evidence adduced at trial to suggest that

defendant used public social websites or that sexually-oriented 900 numbers or establishments that promote the commercialization of sex were used by defendant or visited by defendant in the perpetration of his crimes. Because there was no such evidence presented at trial, there is no nexus between his crimes and the specified prohibitions. As such, community custody conditions which prohibit defendant from using public social websites, telephoning sexually-oriented 900 numbers, or patronizing establishments that promote the commercialization of sex do not fit within what the trial court is authorized to impose as "crime-related prohibitions" under RCW 9.94A.703(3)(f) in the present case.[24] However, in Washington, it is a misdemeanor to patronize a prostitute. RCW 9A.88.110. Because trial courts are allowed to impose conditions requiring offenders to engage in law-abiding behavior, and requiring defendant not to patronize prostitutes is a requirement to engage in law-abiding behavior, the trial court did not err by imposing this condition. *See* RCW 9.94A.704(4).

[24] The Court should note, however, that this does not mean to suggest that such prohibitions against joining or using public social websites and patronizing establishments that promote the commercialization of sex, etc. will always be improper in defendant's case. Under RCW 9.94A.704(2)(a), the department has the authority to "establish and modify additional conditions of community custody based upon the risk to community safety." Therefore, such prohibitions could be deemed appropriate at a later time by the department of corrections under other circumstances. *See also,* ***State v. O'Cain***, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) ("Our holding does not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation).

This Court should therefore remand with orders to strike Condition 27 in full and strike that portion of Condition 29 that prohibits defendant from patronizing "businesses that promote the commercialization of sex" in Appendix H of defendant's judgment and sentence.

b. Condition 23 of Appendix H is authorized by statute and not unconstitutionally vague.[25]

The government's important interest in protecting minors is served by imposing stringent conditions on convicted child molesters. *See* ***State v. McCormick***, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). "[A defendant's] rights are already diminished significantly [when] he [i]s convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. Those conditions... serve an important societal purpose in that they are limitations on ... rights that relate to the [offender's] crimes...." *Id.* at 702-703.

In Condition 23 in Appendix H of defendant's judgment and sentence, the trial court ordered defendant to comply with the following term of community custody: "Do not go to or frequent places where

[25] Appellant assigns error to "Condition 22" of Appendix H prohibiting defendant from frequenting places where children congregate. Brf. App. at 1 (Assignment of Error No. 8), 42-47. Review of Appendix H, however, reveals that the challenged condition is in fact Condition 23. CP 156. Appellant's referral to "Condition 22" appears to be a scrivener's error.

children congregate, (I.E., Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court" with "[i]ncidental attendance" for work duties allowed. CP 156. Defendant argues that this condition is not authorized by statute and is unconstitutionally vague.

Current (and former) RCW 9.94A.703(3)(b) grant the trial court the discretion to order defendant, as part of his term of community custody, to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." *See* Laws of 2009, ch. 214, § 3. The specified class must bear some relationship to the crime. ***State v. Riles***, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled on other grounds by,* ***Valencia***, 169 Wn.2d 782. RCW 9.94A.703(3)(f) also enables the court to require defendant to "[c]omply with any crime-related prohibitions."

In the present case, defendant was found to have molested A.R. when she was between five and seven years old, and again when she was between seven and eleven years old. *See* CP 101-125 (Instruction Nos. 9 and 12), 126, 129; 11RP 56 (A.R.'s date of birth). Because a minor child was the victim in this case, and prohibiting defendant from going to places where children congregate is crime-related and necessary to protect the public, the trial court had statutory authority to impose this condition.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution

requires that citizens have fair warning of proscribed conduct. ***Bahl***, 164 Wn.2d at 752. A sentencing condition is unconstitutionally vague if it does not define the proscribed conduct with sufficient definiteness that ordinary people can understand what is prohibited, or if it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. ***Bahl*** at 752-53.

On a challenge for unconstitutional vagueness, the challenged sentencing terms are considered in the context in which they are used. *Id.* at 754. However, "a community custody condition 'is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" ***Valencia***, 169 Wn.2d at 793 (internal citations omitted). Moreover, "'impossible standards of specificity' are not required since language always involves some degree of vagueness." ***Bahl***, 164 Wn.2d at 759 (*quoting* ***State v. Halstien***, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)).

In ***State v. Irwin***, 191 Wn. App. 644, 647-49, 364 P.3d 830 (2015), the defendant pled guilty to multiple counts of child molestation in the second degree and one count of possession of minors engaged in sexually explicit conduct in the second degree. At sentencing, the court imposed a community custody condition prohibiting the defendant from "frequent[ing] areas where minor children are known to congregate as defined by the supervising" Community Corrections Officer (CCO). *Id.* at

647, 649. Defense counsel objected to this condition as being unconstitutionally vague and requested that the court provide a list of prohibited places as examples (as opposed to leaving such places to the discretion of the CCO). *Id.* at 649.

In response, the trial court gave examples and told the defendant he should not "frequent areas of high concentration of children, such as swimming pools and schools and things like that." ***Irwin***, 191 Wn. App. at 649. However, the final condition imposed did not include this oral clarification. *Id.* at 654-55. On appeal, the defendant argued that the final condition prohibiting him from going where "children are known to congregate" was unconstitutionally vague because it was not immediately clear what places were included. *Id.* at 647, 654-55.

The ***Irwin*** court found that "[w]ithout some clarifying language or an illustrative list of prohibited locations (as suggested by trial counsel), the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'" *Id.* at 655 (citing ***Bahl***, 164 Wn.2d at 753). The court discussed both ***State v. Bahl***, 164 Wn.2d 739, 193 P.3d 678 (2008) and ***State v. Sansone***, 127 Wn. App. 630, 111 P.3d 1251 (2005), and noted that both decisions held that community custody conditions that required further definition from CCOs (regarding the definition of "pornography") were unconstitutionally vague. *Id.* at 654. The ***Irwin*** court struck the challenged condition as void for vagueness and remanded for resentencing. *Id.* at 655.

In the present case, the trial court provided defendant with clarifying language and a list of prohibited locations ("I.E., Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc."). CP 156 (Condition 23). The condition gives defendant, as well as "ordinary people," fair warning of the proscribed conduct. The condition does not give boundless authority to defendant's CCO to designate prohibited conditions and does not require further definition from the CCO. Rather, it only requires defendant to obtain permission from the court in advance of defendant going to such a location. The condition provides ascertainable standards of guilt to protect against arbitrary enforcement. As a result, this condition is not like the vague condition at issue in ***Irwin***. Here, the trial court had the authority to impose Condition 23 of Appendix H.

Defendant also makes a First Amendment argument, claiming the condition at issue "run[s] afoul" of defendant's First Amendment rights. *See* Brf. App. at 43. However, "an offender's constitutional rights during community placement are subject to SRA-authorized infringements, including crime-related prohibitions." ***State v. McKee***, 141 Wn. App. 22, 37, 167 P.3d 575 (2007) (provision barring pornographic materials was crime-related condition of community custody and therefore not overbroad in violation of defendant's free speech rights). Here, the prohibition is a crime-related condition of community custody. Condition 23 is not overbroad, and the sentencing court had the statutory authority to impose

the condition. This Court should affirm the condition of community custody imposed by the trial court.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's convictions but remand for modification of the community custody conditions consistent with the above argument by the State.

DATED: June 19, 2017.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6.19.17
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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